No. 20,766

IN THE

United States Court of Appeals

For the Ninth Circuit

SOUTHPORT LAND & COMMERCIAL COMPANY,
Appellant,

vs.

STEWART UDALL, as Secretary of the Interior,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division

APPELLANT'S REPLY BRIEF

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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ARGUMENT

I.

THE SECRETARY'S ADJUDICATION UNDER R.S. SEC. 2450 MUST CONFORM TO THE PROCEDURAL REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT AND APPELLANT IS ENTITLED TO AN AGENCY HEARING.

The issue on this appeal is most clearly joined by the Secretary of Interior's bald assertion that

> "There is nothing in the language of R.S. Sec. 2450, 43 U.S.C. Sec. 1161, which requires *any* type of hearing, *nor does it require the adjudication to be determined 'on the record after opportunity for an agency hearing.'*" (Br. 19, 20, emphasis added.)

Appellant submits that R.S. Sec. 2450 was enacted by a legislature that understood the meaning of words; that when it commanded the Secretary to decide *"upon principles of equity and justice, as recognized in courts of equity"* it required him to conform to procedures traditionally associated with the judicial process; and that the statute clearly precludes the arbitrary kind of decision-making which the Secretary employed here.

While the Secretary has argued that it is a "glaring non-sequitur" (Br. 19) to assume that because an agency adjudicates, it must comply with the provisions of the Administrative Procedure Act, 5 U.S.C. Sec. 1001, et seq. appellant submits that this is precisely what the law requires. In *Wong Yong Sung v. McGrath,* 339 U.S. 33 (1950), the Court held the Act applicable to hearings in deportation cases even though the deportation statute involved, 39 Stat. 874, 889, as amended, 8 U.S.C. Sec. 155(a), did not require either a hearing or an adjudication. See 339 U.S. at pp. 48, 50-51. Justice Jackson, speaking for the Court, outlined the administrative abuses that preceded the Act and the inherent ambiguity in Sec. 5 of the Act, 5 U.S.C. Sec. 1004, insofar as it applies "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." After discussing the government contention that this limited the Act's application to situations when "explicit statutory words granting a right to adjudication can be pointed out" (339 U.S. at 54), the Court held that the quoted section exempted from its application

> "only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the [Act] inapplicable to hearings, the requirements for which have been read into a statute by the Court in order to save the statute from invalidity." 339 U.S. at 50.

Thus, even the government's argument in the *McGrath* case, supra, *conceded* that the Act, including the hearing requirement of 5 U.S.C. Sec. 1006, applied where the statute granted a right to an agency *adjudication*. Yet, in the present case the Secretary has attempted to persuade this Court that when he adjudicates under R.S. Sec. 2450, he is somehow exempt from following the established procedures of the Administrative Procedure Act.

In *Hannah v. Larche,* 363 U.S. 420 (1960), the Court held that the rules of procedure adopted by the Civil Rights Commission in connection with investigation of alleged Negro voting deprivation were constitutional although they did not provide for cross-examination of complaining witnesses by the voting registrars against whom complaints had been made. In doing so, however, the Court emphasized that the Commission was merely an investigative agency without power to adjudicate or make any determination which would affect a person's legal rights. 363 U.S. 440-441. The Court contrasted the Commission's investigatory function with administrative agencies performing quasi-judicial functions, which, it stated,

were bound by the requirements of the Administrative Procedure Act. 363 U.S. at 445, 451-453.

In essence, then, the Supreme Court has established a functional analysis to determine when an agency is required to conform to the procedural requirements of 5 U.S.C. Secs. 1004 and 1006.

Appellant submits that it would be difficult to imagine a statute more clearly prescribing an adjudicatory, quasi-judicial, function than R.S. Sec. 2450.

The Secretary also argues that since the Secretary disposed of the instant case on a matter of law, it was unnecessary to hold a hearing (Br. 25-26). While it may be true that a trial type hearing, including the opportunity to present evidence and examine witnesses, is not required where there are no disputed facts, in such a case traditional notions of justice require an opportunity to present written and oral argument. See *Producers Livestock Marketing Assn. v. United States,* 241 F.2d 192, 196 (10th Cir. 1957), cited with approval in Davis, *Administrative Law Treatise,* Sec. 701; and *Railroad & Warehouse Commission v. Chicago N.W. Ry.,* 256 Minnesota 227, 98 N.W.2d 60 (1959), which held that such a right is an element of due process. See also *Dredge Corporation v. Penney,* 338 F.2d 456 (1964), which required an opportunity for oral argument upon motion for summary judgment in the District of Nevada and which neither rested upon nor disclaimed the due process clause as a basis for the decision.

Moreover, an alternate basis for the Secretary's decision in this case is that the secret mineral report

(referred to in appellant's amended complaint) (R. 9) indicates that the land was not subject to entry in 1883 because all of the coal deposits had already been removed. (See Appendix to Appellee's Brief, p. 39.) This is clearly a factual determination upon which appellant is entitled to present evidence and cross-examine witnesses in a trial type hearing.

The inherent danger of an agency determination without a hearing is demonstrated in this case. The Secretary argues (Br. 21-22) that he could not adjudicate appellant's claim because the Mineral Leasing Act of 1920, 41 Stat. 437, 30 U.S.C. Sec. 181 et seq. provides the exclusive means of disposing of coal lands. He concedes, however, that there is an exception for suspended entries (Br. p. 22), but states that appellant has no such entry because it was cancelled in 1883.

The amended complaint alleges, and the truth is, that the Commissioner of the General Land Office purported to cancel appellant's entry in 1883. The purported cancellation, however, was a void act without legal effect because it was done without notice or hearing.

An entry upon the public lands, whether under the homestead or mining laws, is a valuable property right which gives the entrant a vested interest in the land which cannot be cancelled except after notice and hearing. *Cameron v. United States,* 252 U.S. 450 (1920); *Lane v. Hoglund,* 244 U.S. 174 (1916); *Orchard v. Alexander,* 157 U.S. 372 (1894); *Cornelius v. Kessel,* 128 U.S. 456 (1888). This Court only recently summarized the rights of an entryman in another case where the Secretary sought to preclude effective review:

"It has long been established that a qualified entryman upon public lands of the United States, whether as a locator of a mining claim, as a homesteader, or as one asserting rights under other of the multifarious laws governing entries on public lands, who perfects his entry by compliance with the applicable Act of Congress, thereby acquires a right to the land as against the sovereign itself, as well as third persons. *Wilbur v. Krushnic,* 1930, 280 U.S. 306. It is such a legal right which appellant here seeks to assert, and it is not a right which the Secretary of the Interior may, in his discretion, ignore or which he may reject 'in the absence of fraud or imposition.' This is precisely the kind of right which the Administrative Procedure Act, with its provisions for judicial review, was designed to safeguard from arbitrary, capricious and illegal deprivation by action of executive and administrative agencies. *Adams v. Witmer* (9 CCA 1959), 271 F 2d 29."

Coleman v. United States, 363 F.2d 190, 196 (9th Cir. 1966).

Thus, appellant has a suspended entry which is specifically exempted from the provisions of the Mineral Leasing Act and which is subject to adjudication under R.S. 2450. The Secretary's failure to afford appellant an agency hearing, however, precluded his consideration of these points.

In the Court below, the Secretary coupled his argument that R.S. 2450 does not require a hearing with the equally shocking proposition that the Court lacked power to review his action because his discretion is

absolute.[1] Although that argument appears to be abandoned on this appeal, it was the argument upon which the District Court based its decision.[2]

Thus, the Secretary appears to argue that (1) his discretion to issue a patent under R.S. Sec. 2450 is absolute, (2) the federal courts have no power to review his decisions, and (3) the federal courts have no power to compel him to hold a hearing before he exercises his absolute discretion. Appellant respectfully submits that to state such an argument is to reject it as unworthy of consideration. Moreover, this Circuit has held that the Administrative Procedure Act is applicable to proceedings related to mining claims and provides a basis for judicial review of agency action. *Adams v. Witmer,* 271 F.2d 29, 32-33 (9th Cir. 1959); *Stewart v. Penney,* 238 F. Supp. 821, 827 (D.C. Nev. 1965). A decision of this Court announced since the filing of the opening brief states that:

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[1]In his memorandum of points and authorities in support of the motion to dismiss appellant's amended complaint, appellee argued: "This Court is without power to direct the retraction or reversal of the action taken by the Bureau of Land Management in its final decision dated January 15, 1964, denying plaintiff a mineral patent. *Wilbur v. United States,* 281 U.S. 206 at 218. Nor may this Court, by mandate, order the defendant Secretary to hold a hearing and exercise his discretion . . ." (R. 22.)

[2]The Order and Judgment of the District Court (R. 30, 31) indicate two grounds for the Court's decision: (1) Failure to state a claim upon which relief could be granted because the matters complained of lie within the sole discretion of the Secretary and, (2) All of the issues pleaded were before the Court in the original complaint which was dismissed for reasons set forth in the Court's memorandum opinion dated August 10, 1965. (Reported at 244 F. Supp. 172.)

> "We think it settled, at least in this Circuit, that although the Administrative Procedure Act does not permit a trial *de novo* of administrative decisions (citations) it does authorize and require judicial review under the Administrative Procedure Act . . ." *Coleman v. United States,* 363 F.2d 190, 193 (9th Cir. 1966).

On the basis of the cited authorities, we believe it clear that appellant is entitled to an agency hearing in this case. It is equally clear that the District Court has power to direct the Secretary to hold such a hearing. As pointed out above, this Circuit has held the Administrative Procedure Act applicable to the Department of Interior and Section 10 of the Act, 5 U.S.C. Sec. 1009, specifically provides that the Court may compel agency action unlawfully withheld.

II.

THE DISTRICT COURT HAS JURISDICTION TO ORDER THAT A PATENT ISSUE.

The Secretary argued in the District Court that it had no jurisdiction to order that a patent issue because the issuance of a patent lies within the absolute discretion of the Secretary. The Court so ruled. On appeal, however, his position has changed and it now appears that he concedes that where the right to a patent is clear, the Court may order its issuance. (Br. p. 28.) As stated in appellant's opening brief, the Secretary's failure to afford it an opportunity to present evidence and make a record may preclude the issuance of a writ at this time because there are no

facts before the Court from which it can determine whether there is a clear duty owed to appellant here.

The authority granted to the Secretary under R.S. 2450 is not, however, "completely discretionary" as he has argued here. (Br. 29.) As pointed out in the first section in this brief, the Secretary is required to conform to procedures traditionally associated with the judicial process. Moreover, his determination is subject to the same standard of review as other agency decisions. It must be supported by substantial evidence and not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. Sec. 1009.

III

APPELLANT'S CLAIM IS NOT BARRED BY LACHES.

The Secretary's last point is that this action is barred by laches since appellant's entry was cancelled in 1883. While this argument may have superficial appeal, it is clear that this action is not barred by the facts pleaded in the amended complaint.

Under California law a cause of action relating to real property does not accrue as to the party in possession of the land until he has notice of a hostile claim. *Tannhauser v. Adams,* 31 C.2d 169, 175 (1947); *McKenna v. Payne,* 105 C.A.2d 752 (1951); *Security Realization Company v. Henderson,* 120 F.2d 449 (9th Cir. 1941) (applying the same rule to personal property).

Paragraph III of appellant's Second Cause of Action alleges continuous possession of the property.

(R. 8.) Paragraph IV (R. 8) alleges that appellant believed in good faith that it was the lawful owner of the property in question since 1883 and did not discover the defect in its title until 1961.

This allegation, together with other allegations setting forth the money spent to improve the land, the taxes paid, and its redemption at a tax sale, rule out the defense of laches The general rule is that the doctrine does not apply absent *inexcusable* delay and *prejudice* to the defendant. See *Holmberg v. Armbreght,* 327 U.S. 392, 395 (1946).

In the present case it is clear that appellant did not sleep on its rights because it was unaware of the defect in its title until 1961. Thereafter, it acted with reasonable diligence in requesting an equitable adjudication in 1963.

CONCLUSION

On the basis of the authorities cited herein and in appellant's opening brief, appellant respectfully requests that the Court reverse the judgment below and direct that appellant be granted a patent or that the matter be remanded to the Secretary of Interior for hearing.

Dated, San Francisco, California,
November 1, 1966.

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